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No. 92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
PETITIONERS

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Petitioners are seeking review of a decision by a court of appeals declaring an Act of Congress unconstitutional under the First Amendment. Invalidating a federal statute on constitutional grounds is "the gravest and most delicate duty" that a court is called on to perform. *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). Respondent nonetheless argues that review is unwarranted, despite the inherent gravity of the court of appeals' undertaking, because the decision below is "both narrow and *sui generis*." Br. in Opp. 7. In fact, it is neither.

In the course of holding 18 U.S.C. 1304 and 1307 unconstitutional as applied to respondent, the Fourth Circuit also invalidated the geographic bright line that separates lawful from criminal conduct under those statutes. Under the Fourth Circuit's decision, it is no longer constitutional for Congress to regulate broadcast lottery advertising by reference to a station's location, as Sections 1304 and 1307 do. Instead, to conform to the Fourth Circuit's view of the First Amendment, Congress would need to take account of the reach of a station's broadcast signal, the alternative media available to its audience, and the content of advertising in each respective medium. The consequence of this decision, if applied elsewhere, would disable Congress from adopting statutes drawing bright-lines to regulate the broadcasting of lottery advertising, since any such rule could be challenged on a station-by-station basis.

2. We explained in our petition that Sections 1304 and 1307 represent a considered effort to further two distinct interests—discouraging lottery participation in States that do not sponsor lotteries and accommodating lottery participation and promotion in States that do. Pet. 13. In determining whether Sections 1304 and 1307 satisfy the "direct advancement" prong of the test adopted in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), the relevant inquiry is whether the statutes represent a satisfactory effort to further those two divergent interests—an undertaking that, by its very nature, precludes Congress from giving unqualified weight to either one.

Respondent argues that Sections 1304 and 1307 serve neither interest when applied to respondent, because respondent's North Carolina audience is exposed to Virginia lottery advertising from a variety of other sources. Br. in Opp. 8-10. Respondent claims that, as applied, Sections 1304 and 1307 have no effect whatever on the exposure of North Carolina residents to Virginia lottery advertising, that Sections 1304 and 1307 "accomplish[] nothing," are "wholly ineffective," and "advance[] no governmental interest whatsoever," and that those statutes necessarily fail *Central Hudson's* direct-advancement test. Br. in Opp. 7, 10, 11. There are three flaws in that argument.

First, the record does not support respondent's repeated assertions that Sections 1304 and 1307 "accomplish nothing" as applied to respondent. The district court itself acknowledged that, as applied to respondent, Sections 1304 and 1307 probably *do* reduce the exposure of North Carolina residents to Virginia lottery advertising, albeit only to a limited extent. See Pet. App. 23a. In the district court's words, "[i]t is probably true that a relatively small number of North Carolina listeners who listen only or mainly to Power 94 may hear significantly less lottery advertising" because of Sections 1304 and 1307, and that "other North Carolinans may hear slightly less lottery advertising because they occasionally listen to Power 94." Pet. App. 23a. Thus, contrary to respondent's suggestion, Br. in Opp. i, this case does not present the question whether the First Amendment is violated by "a ban on commercial speech that is wholly ineffective * * * when applied to a particular speaker." The district court concluded that Sections 1304 and 1307 are not "wholly ineffective," even as applied to respondent.

Second, in applying *Central Hudson*'s direct-advancement test, respondent looks only at one of the

two statutory interests served here by Sections 1304 and 1307—the interest in furthering North Carolina's anti-lottery policy—and altogether ignores the other statutory interest—the interest in accommodating Virginia's state lottery. The statutes seek to advance both policies simultaneously, as they must in order to vindicate Congress's underlying goal of advancing federalism. Pet. 6, 13. Under these circumstances, it is inevitable that the statutes will not insulate respondent's North Carolina audience from Virginia lottery advertising as well as would a single-minded, flat ban on all lottery advertising. But that hardly means that Sections 1304 and 1307 fail to "directly advance" Congress's interests in this setting. The limited impact of the laws on North Carolina residents in this case is inherent in Congress's attempt to accommodate divergent state lottery policies. To hold this attempt unconstitutional would be to hold that one of the legitimate interests furthered by Sections 1304 and 1307 must be sacrificed by Congress to serve the other. Nothing in *Central Hudson* or its progeny requires that result, and respondent cites no authority to support any such claim.

Finally, the Court rejected a similar argument in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). New York City had adopted a noise ordinance requiring concert performers at a city park to use sound amplification equipment and a sound technician provided by the city. There, as in this case, the city offered divergent justifications for its rule: the interest in limiting sound volume for nearby residents, and the interest in ensuring that the sound volume was adequate for concert listeners. The Court held that "[i]t is undeniable that the city's substantial interest in limiting sound volume is served in a

direct and effective way by the requirement that the city's sound technician control the mixing board during performances." 491 U.S. at 800. The Court also held that the city's interest in ensuring that sound volume was adequate supported the city's regulation, even if the regulation were unnecessary in the case of the plaintiff's concerts, "which apparently were characterized by more-than-adequate sound amplification," *id.* at 801. As the Court explained, *ibid.* (citations omitted):

> [T]hat fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it.

The Court concluded that "[c]onsidering these proffered justifications together, therefore, it is apparent that the guideline directly furthers the city's legitimate governmental interests and that those interests would have been less well served in the absence of the sound-amplification guideline." *Ibid.*

The Court's decision in *Ward* v. *Rock Against Racism* undermines respondent's argument. Although *Ward* involved a "time, place, and manner restriction" on speech, this Court made clear in *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989), that "application of the *Central Hudson* test was 'substantially similar' to the application of the test for valid-

ity of time, place, and manner restrictions upon protected speech." Thus, the Court's ruling in *Ward* that "the validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case," 491 U.S. at 801, applies here as well. And when Sections 1304 and 1307 are analyzed in that manner, they clearly satisfy the *Central Hudson* test.

3. As we noted in the petition, Pet. 21, the decision below is especially troubling because it effectively sanctions Congress for relaxing a previously comprehensive ban on broadcast lottery advertising. Respondent finds such a result is defensible, on the theory that a comprehensive ban affects all broadcasters equally, while the partial lifting of broadcast restrictions brought about by Section 1307 "creates favored and disfavored speakers." Br. in Opp. 15-16. Respondent even suggests that the geographic distinctions drawn by Sections 1304 and 1307 offend not only the First Amendment, but equal protection principles as well. Br. in Opp. 15 n.14. That claim, which was not taken up by either of the courts below, is misguided for three reasons.

First, equal protection principles add nothing to the protections afforded by the First Amendment under *Central Hudson*. If the "fit" between statutory means and ends passes muster under *Central Hudson*, the demands of equal protection are necessarily satisfied as well. This Court made that point expressly in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 344-345 n.9 (1986); cf. *Fox*, 492 U.S. at 480.

Second, respondent's equal protection argument assumes that Sections 1304 and 1307, as applied here,

serve only to "silence one voice among many" without advancing any governmental interest. Br. in Opp. 16. But as explained above, it is both a factual and legal fallacy to claim that the statutes do not advance the government's interests as applied in this case. Also, far from silencing "one voice among many," Sections 1304 and 1307 forbid *all* North Carolina licensees from broadcasting lottery advertising. Respondent is not being singled out; instead, it is being subjected to a general geographic restriction that applies to all other broadcasters in the State. That restriction is an eminently sensible means of pursuing Congress's legitimate goals, and it does not violate equal protection principles merely because it is less effective in one instance than in others.

Third, both courts below held that Congress's interest in protecting the anti-gambling policies of non-lottery States is a legitimate and substantial interest; respondent does not argue to the contrary; and respondent does not contend that Congress cannot promote that interest by imposing restrictions on broadcast licensees. It therefore follows that Congress *does* have the authority to silence some speakers (*e.g.*, broadcasters in North Carolina) in favor of others (*e.g.*, broadcasters in Virginia) in order to achieve that interest. Any discrimination in this regard is thus the inevitable consequence of allowing Congress to balance competing interests.

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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